[Cite as *State v. Newsome*, 2012-Ohio-5826.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2012-A-0019**
- vs -	:	
RICHARD LEE NEWSOME,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 487.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt,* Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellant).

Jason L. Fairchild, Andrews & Pontius, L.L.C., 4817 State Road, #100, P.O. Box 10, Ashtabula, OH 44005-0010 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} The state of Ohio, appellant herein, appeals from the judgment of the Ashtabula County Court of Common Pleas sustaining a motion to suppress evidence filed by appellee, Richard Lee Newsome. We affirm the trial court's judgment.

{¶2} At approximately 7:00 p.m., on July 21, 2011, Patrolman Bradek of the Ashtabula City Police Department had just finished her shift and was driving home when she came upon the aftermath of a recent traffic accident. The officer stopped and

observed a motorcycle resting on its side, an injured individual in the center of the road, and appellee standing beside his pick-up truck, which was parked in his driveway. Officer Bradek called for assistance and approached appellee, inquiring whether he was involved in the accident. Appellee said he was and explained that when he attempted to turn into his driveway, the motorcyclist attempted to squeeze between his truck and the curb. As he turned into the driveway, appellee claimed he struck the motorcycle. The officer asked appellee if he had been drinking and appellee responded he had a beer earlier in the day. According to Officer Bradek, appellee exhibited no signs of intoxication.

{¶3} Within minutes Patrolman Defina arrived on the scene. The officer was advised by a witness that the accident was a result of appellee attempting to pass the motorcycle and quickly turn into the driveway. Officer Defina then consulted with Officer Bradek, who told him that appellee admitted consuming one beer earlier. When asked by Officer Defina whether he had been drinking, appellee stated he had a large beer an hour before the accident. Despite this admission, Officer Defina observed no indicia of intoxication in appellee's actions, speech, appearance, or demeanor.

{¶4} Officer Defina nevertheless initiated three field sobriety tests based solely upon appellee's statement. The officer noticed several clues on the horizontal gaze nystagmus ("HGN") test; two clues on the walk and turn test; and no clues on the one leg stand test. Given his interpretation of appellee's performance, the officer concluded appellee was "borderline." The officer then asked appellee to take a breath test, which he voluntarily took. Appellee's breath test yielded a reading of .14 and he was subsequently cited with operating a vehicle while intoxicated ("OVI").

{¶5} On December 1, 2011, appellee was indicted on one count of aggravated vehicular assault, in violation of R.C. 2903.08, a felony of the third degree; and two counts of OVI, in violation of R.C. 4511.19, both misdemeanors of the first degree. Appellee pleaded not guilty and filed a motion to suppress evidence. In his motion, appellee argued the evidence of the field sobriety tests should be suppressed because (1) the officer lacked reasonable suspicion to initiate the tests and (2) the officer failed to substantially comply with the applicable standards for administering the tests. Appellee also asserted the breath test results should be suppressed because the officer lacked the requisite probable cause to administer that test.

{¶6} The trial court held a suppression hearing and, on May 16, 2012, it issued its judgment entry sustaining the motion. The court found that neither Officer Bradek nor Officer Defina observed appellee driving. Hence, the court found that, even though appellee may have committed a traffic violation, the state failed to introduce any evidence that appellee's driving was erratic. The court further found appellee had no observable signs of intoxication and thus the only fact upon which Officer Defina could premise his initiation of field sobriety tests was appellee's admission to drinking one beer. Given these findings, the trial court concluded:

> **{¶7}** [I]t is not illegal to consume intoxicating beverages, or to operate a vehicle after consuming alcoholic beverages. It is illegal to operate a motor vehicle while under the influence of such beverages. Thus, an admission of consuming alcohol, unsupported by some other evidence of impairment, does not

amount to reasonable articulable suspicion for the administration of field sobriety tests.

{¶8} The trial court further found that the evidence adduced at the suppression hearing demonstrated that Officer Defina significantly deviated from the recommended procedures for administering the HGN and walk and turn tests. The court therefore concluded the officer did not substantially comply with the requisite standards for administering the tests.

{¶9} Finally, the trial court found that Officer Defina lacked probable cause to believe appellee was driving under the influence, a necessary condition for administering a breath test. The court further found that Officer Defina recommended appellee take a breath test to prove he was *not* under the influence. Both parties stipulated that the officer did not read the standard administrative license suspension form to appellee before initiating the breath test. Thus, the court concluded, "[i]t cannot be reasonably suggested that the defendant voluntarily provided a breath sample after he was formally advised that his refusal to complete the breath test would result in suspension of his driver's license." For these reasons, the court concluded the breath test results were inadmissible.

{¶10} The state filed a timely appeal of the court's judgment and assigns the following as error:

{¶11} "The trial court erred in granting appellee's motion to suppress."

{¶12} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge

acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger*, 86 Ohio App.3d 592, 594 (4th Dist.1993). Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, ¶19.

{¶13} In *State v. Evans*, 127 Ohio App.3d 56 (11th Dist.1998), this court set forth a non-exclusive list of factors to be considered when determining whether a police officer has a reasonable suspicion of intoxication justifying the administration of field sobriety tests. That list, with no one factor being dispositive, consists of the following:

{¶14} (1) the time and day of the stop (Friday or Saturday night as opposed to, *e.g.*, Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight,"

> etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. *Id.* at fn. 2.

{¶15} In *State v. Brickman*, 11th Dist. No. 2000-P-0058, 2001 Ohio App. LEXIS 2575 (June 8, 2001), this court observed that "[c]ourts generally approve an officer's decision to conduct field sobriety tests when the officer's decision was based on a number of factors [set forth in *Evans*, supra]." *Brickman*, at *8, citing *Evans*, supra, at 63.

{¶16} Under its sole assignment of error, the state contends Officer Defina had reasonable suspicion to initiate field sobriety tests because several *Evans* factors were present to justify his request. To wit, the state asserts appellee admitted to consuming alcohol an hour before the encounter. The state further contends appellee was behaving in an odd manner, i.e., he appeared nervous and kept his distance from Officers Bradek and Defina; and, finally, the state notes that the accident in which appellee was involved was sufficient to support an inference that appellee had been driving in a reckless fashion, which would support the conclusion that he was impaired.

{¶17} Although appellee did admit to consuming a large beer an hour before the incident, nothing in the record suggests he was acting strangely given the circumstances. Nervousness is a predictable, indeed reasonable, response to involvement in a traffic accident. And, in any event, the officers specifically testified that appellee showed *no signs of intoxication*. Appellee's eyes were not red; he did not slur his words; he had no odor of alcohol; and he was highly cooperative with the investigating officers.

{¶18} Moreover, although the fact of an accident *could be* a factor used in establishing reasonable suspicion for initiating field sobriety tests, nothing in Officer Defina's testimony indicates he considered the circumstances of the accident as a partial foundation for his decision to initiate field sobriety tests. To the contrary, the officer testified he initiated the tests as a result of the admission.

{¶19} Further, the trial court took specific note of this, finding the prosecution introduced no evidence that appellee's operation of his vehicle, prior to the accident, was erratic. The court found that, even though appellee may have committed a traffic violation in passing the motorcycle, this, without more, is insufficient to support the conclusion that appellee's driving was impaired as a result of intoxication. In this case, although there was a witness who told Officer Defina that appellee caused the accident when he cut in front of the motorcycle, that witness was not called to testify. Without more information regarding the specific nature of appellee's driving prior to or during the accident, we cannot say, as a matter of law, appellee's alleged traffic violation was indicative of impairment. We therefore will not disturb the trial court's findings and conclusions on this issue.

{¶20} Various courts, including this one, have concluded that a driver's admission to consuming one beer does not warrant field sobriety tests, even when coupled with other additional factors. *Brickman*, *supra*, at *8 (no reasonable suspicion to initiate field sobriety tests where defendant was driving 20 m.p.h. over speed limit, smelled mildly of alcohol, and admitted to consuming one beer); *State v. Reed*, 7th Dist. No. 05 BE 31, 2006-Ohio-7075, ¶27 (admission of two drinks, slight smell of alcohol and red, glassy eyes insufficient to establish reasonable suspicion for field sobriety tests.) *State v. Dixon*, 2d Dist. No. 2000-CA-30, 2000 Ohio App. LEXIS 5661 (de minimus lane violation, slight odor of alcohol, and admission to consuming one or two beers insufficient to establish reasonable suspicion for initiating field sobriety tests); *State v. Gustin*, 87 Ohio App.3d 859, 861 (12th Dist.1993) (trooper responding to single car accident did not have reasonable suspicion where driver exhibited no indicia of impairment).

{¶21} In this case, appellee's admission to consuming one large beer was the only factor upon which Officer Defina relied to conduct field sobriety tests. Because it is not illegal to consume alcohol and drive in this state, appellee's admission, standing alone, is insufficient to establish reasonable suspicion of intoxication. Alcohol ingestion is not tantamount to alcohol impairment. *See e.g. State v. Taylor*, 3 Ohio App.3d 197, 198 (1st Dist.1988) (indicia of alcohol consumption is no more indication of intoxication than eating a meal is of gluttony.) For these reasons, we hold the trial court did not err in sustaining appellee's motion to suppress evidence. Because the officer lacked reasonable suspicion to initiate field sobriety tests, we hold all results from those tests, including the breath test results, must be excluded.

{¶22} The state's assignment of error is without merit.

{¶23} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.